What cost a pool with an ocean view?

In *Shadbolt v Wise* [2002] QSC 348 the applicants were seeking relief under s184 of the *Property Law Act* 1974 (Qld) in respect of an encroachment that they constructed on land belonging to the adjacent owner. The encroachment in question consisted of slightly less than one half of an elaborate pool and pool enclosure (the area of the encroachment being approximately 108 square metres). The land upon which the encroachment was situated was elevated with distant ocean views.

Background

The applicants were aware of a fence between the property in question and the property of the adjacent owner. The fence, a timber post and barbed wire fence, had been in place for approximately 90 years. The fence was not erected on the true boundary between the properties. At all times there had been a wooden survey peg, painted white, that was located on the true boundary. The applicants made an incorrect assumption about the survey peg and never at any stage sought to check what the peg indicated.

The applicants engaged a pool contractor to construct the pool. The male applicant discussed with the pool contractor that the fence was the boundary and instructed the contractor that the relevant regulations required the pool to be 1500 mm from what the male applicant assumed to be the boundary. Notwithstanding this instruction the male applicant described the actual position where the pool was constructed as “an ideal position” even though the male applicant was aware that would result in the pool encroaching onto the 1500 mm distance from what was assumed to be the boundary fence. The applicants seem to have largely been motivated by a desire to have a pool with ocean views.

The relief being sought by the applicants was an order for the transfer to them of the land that was the subject of the encroachment, conditional only upon the payment by them of reasonable compensation to the adjacent owner. The adjacent owner was seeking an order for the removal of the encroachment and for the costs of the application. The adjacent owner was anxious to preserve the integrity of the boundaries of his property, which was used for running cattle, as the property was the only property in Buderim whose boundaries had not changed since 1883.

Valuation evidence

The applicants’ valuer placed a value of $1,000.00 on the land the subject of the encroachment. However the valuer conceded that a purchaser might be prepared to pay a premium over what would otherwise be the value of the subject land, in order to obtain it to construct a $50,000.00 swimming pool. The valuer conceded that a premium of between $4,000.00 and $6,000.00 might be appropriate when a person was proposing to spend this much on a pool.

Should relief be granted?

As a threshold issue, Justice Mullins had to determine if any relief should be granted to the applicants. If the encroachment were characterised as deliberate relief should be denied. To grant relief in such circumstances would be tantamount to the court setting its seal of approval on a deliberate trespass.

Although commenting on the applicants' flagrant disregard of the adjacent owner's rights and their lack of prudence in failing to conduct a check survey, Mullins J did not believe that the applicants were precluded from seeking relief. Her Honour's reasoning in this regard is instructive:

"There was no warrant for the applicants to rely on the existing location of an old fence as the boundary, when they had no reliable information to confirm that the fence was on the correct boundary. Their conduct is aggravated by the fact that the actual location for constructing the pool and pool enclosure was chosen because it was the 'ideal position' and captured ocean views. Their arrogance is confirmed by their lack of compliance with clearance requirements from what they assumed was the boundary……I have concluded, however, that their recklessness falls short of being 'full knowledge' of the encroachment and that this is therefore not [a] case where the encroachment was deliberate." (At [52])

Decision

In determining appropriate relief to grant to the applicants Justice Mullins had to balance a number of relevant factors, just one of which was the applicants' recklessness.

The expenditure by the applicants of almost $54.000.00 in clearing the land and constructing the pool and pool enclosure was significant as was the fact that it would cost a minimum of $15,600.00 to demolish the pool, screen enclosure and timber decking. Although the historical and family ties of the adjacent owner were not irrelevant considerations, Justice Mullins opined that the dismantling of the pool enclosure and the demolition of the pool would result in the destruction of a significant asset at a significant cost. That cost easily outweighed the loss and damage caused to the adjacent owner by the encroachment, particularly in circumstances where the provisions of the *Property Law Act* 1974 (Qld) could be utilised to ensure a just result to the adjacent owner.

In these circumstances it was considered appropriate to grant the relief sought by the applicants, namely to order the transfer of the land upon which the encroachment existed. This left only the issue of compensation to be determined.

Compensation

Section 186 of the *Property Law Act* 1974 (Qld) provides that the minimum compensation payable to the adjacent owner shall be the unimproved capital value of the land transferred if the encroachment was not intentional and did not arise from negligence. In any other case the compensation is to be 3 times such unimproved capital value.

As the applicants had been found to be negligent, the compensation awarded was three times the unimproved capital value of the land upon which the encroachment existed.

How was the unimproved capital value to be determined?

Justice Mullins considered it relevant that the land was sought for the purpose of the construction of a pool and pool enclosure for the enjoyment of the applicants. Logically, even though the land may otherwise have a nominal value, a purchaser who required the particular land for particular purposes would be prepared to pay a premium and a vendor would not fail to take into account the use to which the land could be put when setting a fair price at which the vendor would be prepared to sell.

On this basis the unimproved capital value of the land in question was set at $5,000.00, making $15,000.00 compensation payable by the applicants.

Conclusion

The decision highlights the potency of the encroachment provisions of the *Property Law Act* 1974 (Qld). Although the adjacent owner may have been disappointed that the integrity of his property was not preserved, in monetary terms the applicants were duly admonished for their recklessness. The “pool with a view” came at a high cost although the cost would have been far higher if the applicants’ conduct had been characterised as deliberate rather than merely reckless.

The case reinforces the prudence of undertaking a survey before undertaking any significant building work, and the dangers inherent in a flagrant disregard of an adjacent property owner’s rights.

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